NO. 46536-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ANTHONY HOWARD PATTON, JR.., APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Jack Nevin, Judge

No. 13-1-02266-6

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
THOMAS C. ROBERTS
Deputy Prosecuting Attorney
WSB # 17442

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

Table of Authorities

State Cases

Statutes

Rules and Regulations

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Where the victim was suddenly strangled by her intimate partner and was visibly injured and upset shortly thereafter when she made statements to the responding officer about the strangulation, did the trial court abuse its discretion by admitting the statements under the excited utterance exception to hearsay?

B. STATEMENT OF THE CASE.

1. Procedure

On June 5, 2013, Anthony Howard Patton, Jr., (hereinafter "defendant"), was charged by information of second degree assault, a domestic violence incident. CP 1; RCW 9A.36.021(1)(g), RCW 10.99.020. On September 9, 2013, the State amended the information to include one count of tampering with a witness and two counts of violation of a no contact order, all domestic violence incidents. CP 6-8; RCW 9A.72.120(1)(a), RCW 26.50.110(1), RCW 10.99.020.

After a CrR 3.5 hearing, the court found statements made by defendant to the arresting officer were admissible. (6/04 & 05/14) RP 46.[1] Additionally, the court found statements made by the victim to the

[1] The verbatim report of proceedings will be referred to by the date, RP, and page number (XX/XX/XX)RP #.

responding officer fell under the excited utterance exception to the hearsay rule and were thus admissible. (6/04 & 05/14)RP 47-48.

After the State rested its case-in-chief, defendant moved to dismiss for insufficient evidence. (06/11/14)RP 71. The motion was denied. (06/11/14)RP 74. The defendant testified in his defense. (6/11/14)RP 78-111.

The jury found defendant guilty as charged. CP 50, 52, 54, 56. The jury also found, by special verdict on all counts, that defendant and the victim were members of the same household. CP 49, 51, 53, 55. Defendant was sentenced to a standard range sentence of 50 months – 43 concurrent months for counts I and II, to run consecutively with 7 concurrent months for counts III and IV. CP 314. Defendant filed this timely appeal. CP 329.

2. Facts

On June 4, 2013, defendant strangled Colleen Begallia in the bedroom they shared. (06/11/14)RP 4. Defendant and Begallia had been dating for about two years. (06/04 & 05/14)RP 93. For the three days preceding the incident, defendant and Begallia smoked methamphetamine together and stayed up all night. (06/04 & 05/14)RP 98. The two had been arguing. (06/04 & 05/14)RP 95.

Around 7:00 a.m. on June 4, 2013, Begallia attempted to leave their shared room to go downstairs and wash her face. (06/11/14)RP 4. The next thing Begallia recalled was defendant strangling her. (06/11/14)RP 4.[2] Begallia unsuccessfully tried to get away from defendant as he strangled her. (06/11/14) 5. Defendant whispered into Begallia's ear, "[Y]ou drama queen, you drama queen, you like this shit." (06/11/14)RP 5.

At 7:28 a.m., Officer Darrin Latimer received a dispatch call in response to a 911 call made from a pay phone at a service station. (06/04 & 05/14)RP 65. When Latimer arrived on scene at 7:30 a.m., he saw Begallia standing by the pay phone wearing a pair of shorts, a tank top, and no shoes. (06/04 & 05/14)RP 67. Latimer described Begallia as crying, distraught, tears on her face, and "obviously upset." (06/04 & 05/14)RP 67. Begallia had scratches on her neck that were bleeding as well as red marks. (06/04 & 05/14)RP 68.

When Latimer asked Begallia what was going on, Begallia said her boyfriend, defendant, and her had been arguing for a few days. (06/04 &

---

[2] It should be noted that Begallia initially testified that she attacked defendant because he was preventing her from leaving the bedroom without being fully dressed. (06/04 & 05/14)RP 104. However, after an unrelated medical incident made her unavailable to complete her testimony for several days, Begallia acknowledged her previous inconsistent testimony, (06/11/14)RP 5, but was adamant that the strangling occurred. (06/11/14)RP 9 ("I was up against the wall, I couldn't breath . . . . I had red marks around my neck . . . . He physically choked me, and I don't deserve that.")

05/14)RP 68. That morning, when Begallia attempted to leave their room, defendant "suddenly grabbed her by the throat and held her down on the bed by her throat strangling her." (06/04 & 05/14)RP 68. Begallia struggled to breath. (06/04 & 05/14)RP 68. When Begallia broke free, she ran the two blocks to the service station to call 911 without even taking time to put shoes on. (06/04 & 05/14)RP 69.

Following defendant's arrest, a domestic violence no-contact order was issued protecting Begallia from defendant pending the disposition of the case. Ex. 4.[3] While defendant was in jail, Begallia wrote him letters. (06/11/14)RP 14. Defendant called Begallia from jail. (06/11/14)RP 12. Begallia confirmed the voices on the jail phone call recordings were her and defendant's. (06/11/14)RP 15; Ex. 16, 17.

Defendant testified in his defense. (06/11/14)RP 78-111. Defendant claimed that Begallia was the first aggressor and was getting in defendant's face, screaming, and swearing at him. (06/11/14)RP 82-83. Defendant claimed that, upon being agitated, Begallia tried to leave but defendant stopped her because she was not fully clothed. (06/11/14)RP 87. That is when things became physical. (06/11/14)RP 87. Defendant claimed that he "grabb[ed] her by the neck to get her off [him] because it

[3] The order was signed on June 5, 2013 and set to expire June 5, 2018. Ex. 4.

was the only way." (06/11/14)RP 87-88. Defendant admitted to violating the no-contact order. (06/11/14)RP 93; Ex. 4.[4]

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING THE VICTIM'S STATEMENTS UNDER THE EXCITED UTTERANCE HEARSAY EXCEPTION WHERE IT FOUND ALL THE ELEMENTS OF THE RULE.

a. The victim's statements were properly admitted under the excited utterance hearsay exception.

A trial court's decision to admit or exclude evidence is reviewed for manifest abuse of discretion. ***State v. Magers***, 164 Wn.2d 174, 187, 189 P.3d 126 (2008) (citing ***State v. Thomas***, 150 Wn.2d 821, 854, 83 P.3d 970 (2004)). An abuse of discretion will only be found when the trial court based its decision on untenable grounds. ***State ex. Rel. Carroll v. Junker***, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Evidence Rule 801(c) defines hearsay as: "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay is not admissible, except as provided by the rules of evidence, by other court rules, or by statute. ER 802.

[4] Defendant testified, "Sir, if it will help you, I can verify that I'm in violation of that. I know I did that." (06/11/14)RP 93.

Evidence Rule 803 provides exceptions to the hearsay rule. One such exception is an excited utterance. Under ER 803(2), "A statement relating to a startling even or condition made while the declarant was under the stress of excitement caused by the event or condition" is not excluded. ER 803(2). "A statement qualifies as an excited utterance if (1) a startling event occurred, (2) the declarant made the statement while under the stress of excitement of the event, and (3) the statement relates to the event." ***State v. Magers***, 164 Wn.2d 174, 187-188, 189 P.3d 126 (2008) (citing ***State v. Woods***, 143 Wn.2d 561, 597, 23 P.3d 126 (2008)).

The statement does not need to be spontaneous or contemporaneous with the startling event. ***State v. Bache***, 146 Wn. App. 897, 904, 193 P.3d 198 (2008) (citing ***State v. Thomas***, 150 Wn.2d 821, 855, 83 P.3d 970 (2004)). Rather, the question is whether the declarant was still under the stress of the event. ***Bache***, 146 Wn. App. at 904 (citing ***State v. Strauss***, 119 Wn.2d 401, 416, 832 P.2d 78 (1992)). The passage of time between the statement and the startling event is a factor to be considered, but time alone is not dispositive. ***State v. Strauss***, 119 Wn.2d 401, 416-417, 832 P.2d 78 (1992). Additionally, the first and second elements must be established by evidence extrinsic to the declarant's bare words. ***State v. Young***, 160 Wn.2d 799, 809-910, 161 P.3d 967 (2007).

In the present case, the trial court addressed all the elements of the excited utterance exception. Looking to the three factors for admission under the excited utterance exception, Begallia's statements met all three. *See* ***Magers***, 164 Wn.2d at 187-188. First, a startling event occurred; Begallia was suddenly strangled by defendant, her boyfriend, in her own home. (06/11)RP 4. Begallia's neck was scratched and red, which provided extrinsic evidence of the startling event. (06/04 & 05/14)RP 68.

Second, Begallia made the statement to Officer Latimer while still under the stress of excitement of that event. Latimer described Begallia as "obviously upset," she was crying and distraught. (06/04 & 05/14)RP 67. Begallia appeared "scared and upset." (06/04 & 05/14)RP 83. Further, Latimer observed Begallia's injuries which were consistent with her description of the startling event. (06/04 & 05/14)RP 68. These injuries and physical manifestations of emotion provided extrinsic evidence that Begallia was still under the stress of the event. Although time alone is not dispositive, it should be noted that from the time defendant choked Begallia to when Officer Latimer responded, only about thirty minutes had passed. (06/11/14)RP 4, (06/04 & 05/14)RP 65.

Third, the statements made by Begallia related to the startling event. Begallia told Latimer that defendant strangled her, she struggled to breath, and began to lose consciousness. (06/04 & 05/14)RP 68-69.

Begallia also told Latimer she thought defendant was going to kill her. (06/04 & 05/14)RP 70. These statements directly related to the startling event Begallia experienced when she was physically attacked by her intimate partner, defendant. Therefore, the trial court did not abuse its discretion by finding Begallia's statement to Officer Latimer fell under the excited utterance exception and was admissible.

Defendant asserts that the trial court abused its discretion in admitting the statements because Begallia's "excited manner" could have been caused by her methamphetamine use. Br. of App. p. 10. However, defendant's insistence upon methamphetamine being a possible cause for the victim's excitement fails to consider that drug use by the victim goes to the *weight* of the testimony, not its admissibility. ***State v. Greene***, 15 Wn. App. 86, 89, 546 P.2d 1234 (1976). Since the elements of an excited utterance were met—the victim was strangled, she made her statement while still under the stress of the strangulation, and the statement related to the strangulation—the possible influence of methamphetamine was a question of credibility.

In making his ruling, the judge explicitly said the statement had the "necessary indicia of reliability and trustworthiness at least to be allowed . . . and then *the rest goes to the weight the trier of fact should accord that evidence.*" (06/04 & 05/14)RP 47-48 (emphasis added).

Officer Latimer, an officer familiar with the effects methamphetamine may have on people, testified that he had no reason to suspect Begallia was under the influence of methamphetamine based on her actions that morning. (06/04 & 05/14)RP 84-85. Begallia was also forthright with the jury about her methamphetamine use. (06/04 & 05/14)RP 104.

Ultimately, the judge did not foreclose upon the possibility that the methamphetamine use contributed to Begallia's demeanor that morning. Rather, the judge left that determination of credibility properly in the hands of the jury. The jury was further provided information both by Officer Latimer and Begallia about her methamphetamine use. The jury is the sole judge of witness credibility, and "[o]nly with the greatest reluctance and with clearest cause should judges--particularly those on appellate courts--consider second-guessing jury determinations or jury competence." ***State v. Kirkman***, 159 Wn.2d 918, 938, 155 P.3d 125 (2007). The jury could have found that Begallia's methamphetamine use impacted the statements she made to Officer Latimer as a matter of witness credibility. However, it is not the role of this court to second guess those credibility determinations made by the jury from the testimony presented.

b. Even if the admission under the hearsay exception was an error, it was harmless.

Even if this Court finds the victim's statements should not have been admitted under the excited utterance to hearsay, it should still affirm defendant's conviction because the error was harmless. Improper admission of evidence may be harmless error. ***State v. Ramirez-Estevez***, 164 Wn. App. 284, 293, 263 P.3d 1257 (2011). An error is harmless if, within reasonable probability, it did not affect the outcome of the trial. ***State v. Dixon***, 37 Wn. App. 867, 875, 684 P.2d 725 (1984) (citing ***State v. Cunningham***, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980)).

In the present case, the statements made by Begallia to the responding officer would have been presented to the jury even if the trial court had not allowed them to come in under the excited utterance exception to hearsay because Begallia testified, and was subject to cross-examination, herself. As previously discussed, Begallia testified that defendant strangled her. (06/22/14)RP 4. Begallia's account of the events was consistent with the statements she made to Officer Latimer that were admitted under the excited utterance hearsay exception. Therefore, the facts asserted by the statements at issue in this case would have come before the jury even if they were not admitted through Officer Latimer.

Defendant asserts that allowing Begallia's statements to come in improperly bolstered her credibility. Br. of App. p.11. This argument has previously been rejected. ***State v. Schimmelpfennig***, 92 Wn.2d 95, 99, 594 P.2d 442 (1979)("Furthermore, we see no reason why statements otherwise admissible as excited utterances should be barred when corroborating the testimony of another witness. We note the Court of Appeals of this state has approved the use of this exception to admit corroborating testimony.")(citing ***State v. Canida***, 4 Wn. App. 275, 480 P.2d 800 (1971); ***State v. Bloomstrom***, 12 Wn. App. 416, 419, 529 P.2d 1124 (1974)).

It should also be noted that if Begallia had testified before Officer Latimer, the statements at issue would not have been hearsay. Given the allegations of recent fabrication or improper influence against Begallia, the statements she made to Officer Latimer likely would have been found to be not hearsay under ER 801(d)(1)(ii). A statement is not hearsay if the declarant testifies at trial and is subject to cross examination—as Begallia was—and the statement is consistent with the declarant's testimony and is offered to rebut a charge against them of recent fabrication or improper influence. ER 801(d)(1)(ii); *see* ***State v. Thomas***, 150 Wn.2d 821, 865, 83 P.3d 970 (2004)("If there is an inference raised in cross examination that the witness changed her story in response to an external pressure, then

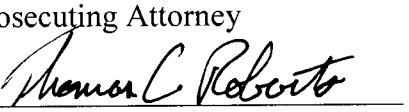
whether that witness gave the same account of the story . . . becomes highly probative"). Thus, but for the chronological order of the witnesses, the statement via Officer Latimer would not have been hearsay.

D. CONCLUSION.

The trial court did not abuse its discretion by admitting the victim's statements under the excited utterance exception to hearsay. The statements were made in response to a startling event—the victim's boyfriend, defendant, strangling her—and while the victim was still under the stress of event. Further, any potential error in the admission of the statements under the hearsay exception would have been harmless. The State respectfully requests defendant's convictions be affirmed.

DATED: MARCH 18, 2015

MARK LINDQUIST
Pierce County
Prosecuting Attorney



THOMAS C. ROBERTS
Deputy Prosecuting Attorney
WSB # 17442

Jordan McCrite
Appellate Intern

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3/18/15 _____
Date Signature

PIERCE COUNTY PROSECUTOR

March 18, 2015 - 9:59 AM

Transmittal Letter

Document Uploaded: 4-465361-Respondent's Brief.pdf

Case Name: STATE V. ANTHONY HOWARD PATTON, JR.

Court of Appeals Case Number: 46536-1

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Heather M Johnson - Email: hjohns2@co.pierce.wa.us

A copy of this document has been emailed to the following addresses:

SCCATTORNEY@YAHOO.COM